



G A R V E Y S C H U B E R T B A R E R  
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Please reply to COLIN BLACK ANDREWS  
candrews@gsblaw.com  
TEL EXT 2527

November 13, 2015

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

Re: *Expanding the Economic and Innovation Opportunities of Spectrum through  
Incentive Auctions*, GN Docket No. 12-268

*Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for  
Digital Low Power Television and Television Translator Stations*, MB Docket  
No. 03-185

*Policies Regarding Mobile Spectrum Holdings Competitive Bidding Procedures  
for Broadcast Incentive Auction 1000, Including Auction 1001 and 1002*, Docket  
No. 12-269

*Amendment of Parts 15, 73 and 74 of the Commission's Rules to Provide for the  
Preservation of One Vacant Channel in the UHF Television Band for Use by  
White Spaces Devices and Wireless Microphones*, MB Docket No. 15-146

*Competitive Bidding Procedures for Broadcast Incentive Auction 1000,  
Including Auction 1001 and 1002*, AU Docket No. 14-252

**Notice of Ex Parte Presentation**

Dear Ms. Dortch:

In accordance with FCC Rule 1.1206(b)(2), this letter is submitted in abundance of caution to notify you that on September 21, 2015 Free Access & Broadcast Telemedia, LLC ("FAB") received a response to its Freedom of Information Act ("FOIA") request, filed on August 20, 2015 (FCC FOIA Control No. 2015-729), for documents regarding the Incentive Auction. The response was from Mr. William Scher, Assistant General Counsel and Deputy Chairman for Law and Policy, and is provided as Attachment A along with FAB's original request as Attachment B.



FAB timely filed an appeal of the FOIA determination on October 21, 2015. See Attachment C. FAB requested and the FCC staff agreed to process a continuation of a portion of FAB's request that was held in abeyance pending action on other elements of the request. This continuation submission, dated November 10, 2015, is provided here as Attachment D.<sup>1</sup>

In providing this information for public disclosure, FAB respectfully requests responses on the following points:

1. As a matter of attaining an arm's length and independent FOIA processing that another member of the General Counsel's staff, or the General Counsel, should sign off on FAB's pending FOIA Appeal reply.<sup>2</sup>
2. We are aware that Mr. Sher has signed off on communications on other FOIA requests related to the Incentive Auction. We ask the FCC to include these requests in the record, as we have done here, by entering the relevant documents into Dockets 12-268 and 03-185.<sup>3</sup>
3. On October 22, 2015, acting under their Congressional oversight authority, four Members of the U.S. House of Representatives asked for similar analyses to be produced by the Chairman by November 18, 2015.<sup>4</sup> That letter is provided here as Attachment E. We ask that the responses provided by Chairman Wheeler to this request also be entered into the relevant dockets immediately for all to review. The release of such information will aid interested parties submitting comments in the still open NPRM 03-185 and offer solutions to mitigate the damages to LPTV licenses (as requested by the FCC in paragraph 59 of that NPRM).

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<sup>1</sup> A new FCC FOIA Control No. nor a FOIA Online number has been provided yet as of today's date to this continuation of FCC FOIA Control No. 2015-729 (FOIA Online number FCC-2015-000729).

<sup>2</sup> Mr. Scher is a member of the Incentive Auction Task Force and has been diligently working on the Incentive Auction since its inception. Given his level of involvement, FAB believes he has an interest in the outcome of this FOIA and, in order to achieve an independent response, another member of the General Counsel's staff should have signed off on the response.

<sup>3</sup> The two existing FOIA requests FAB is aware of were filed by Bloomberg/BNP (FCC FOIA Control No. 2015-756 and FOIA Online search number FCC-2015-000756) and Judicial Watch (FCC FOIA Control No. 2016-012 and FOIA Online search number FCC-2016-000012).



G A R V E Y S C H U B E R T B A R E R

Marlene H. Dortch, Secretary  
November 13, 2015  
Page 3

We respectfully request a reply in writing via e-mail or letter from:

- *The General Counsel* or, as assigned, the Assistant General Counsel regarding item # 1;
- *The FOIA team* led by Mr. Ryan Yates regarding item #2; and
- *The Chairman's Office* or at his direction from the Office of Legislative Affairs or the IATF regarding item #3.

Respectfully submitted,

Colin Andrews  
Counsel to Free Access & Broadcast Telemedia, LLC

CBA:cll  
Enclosures

cc: Office of Hon. Renee Ellmers  
Office of Hon. Kevin Cramer  
Office of Hon. Gus M. Bilirakis  
Office of Hon. Billy Long  
Hon. Tom Wheeler, FCC Chairman (c/o ruth.milkman@fcc.gov)  
Jonathan Sallet, FCC General Counsel (jonathan.sallet@fcc.gov )  
William Scher, FCC Assistant General Counsel (william.scher@fcc.gov)  
Gary Epstein, IATF Chair (gary.epstein@fcc.gov)  
Edward Smith, Wireless Legal Advisor to the FCC Chairman (edward.smith@fcc.gov)  
James W. Wiley, III, Senior Attorney (james.wiley@fcc.gov)  
Ryan Yates, FCC FOIA Attorney Advisor (ryan.yates@fcc.gov)

# **Attachment A**



Federal Communications Commission  
Washington, D.C. 20554

September 21, 2015

Colin B. Andrews  
Garvey Schubert Barer  
1000 Potomac Street, Fifth Floor  
Washington, DC 20008  
Via e-mail to [candrews@gsblaw.com](mailto:candrews@gsblaw.com)

Re: FOIA Control No. 2015-729

Mr. Andrews:

This letter responds to your Freedom of Information Act (FOIA) request for various records related to the Greenhill 1 Report, detailed below. Your request has been assigned FOIA Control No. 2015-729. We are responding to your request within 20 business days as required by the FOIA.<sup>1</sup>

Your request was divided into three subparts. We address each subpart in turn.

- 1) *Any and all comments, underlying assumptions, and/or output analysis conducted by FCC staff and consultants in preparation for the FCC's Greenhill 1 Report, ("Report") released in Oct., 2014. The FCC has acknowledged having modeled scenarios before and after that date analyzing channel clearing for each DMA which explicitly or implicitly cast light on the possible impacts on LPTV clearing and new LPTV assignments, if any. We seek copies of all these analyses, especially the versions selected that coincide with the Report.*

In attempting to fulfill your request, we have consulted with several subject matter experts that serve on the Incentive Auctions Task Force. These staff members have stated that the Commission did not, in connection with the Greenhill 1 Report, undertake the modeling of scenarios that analyzed channel clearing for each designated market that "cast light on the possible impacts on LPTV clearing and new LPTV assignments."<sup>2</sup> As no such analysis was conducted, we conclude there is no reasonable expectation of finding responsive documents.<sup>3</sup>

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<sup>1</sup> You had initially requested expedited processing of your request, but subsequently withdrew the request for expedited processing. E-mail from Colin B. Andrew, Garvey Schubert Barer, to Sherille Ismail, Senior Counselor, Federal Communications Commission (Aug. 27, 2015).

<sup>2</sup> The Commission and the Media Bureau have previously stated on the record that "neither the Greenhill Report nor any other data or analysis developed by the staff in connection with the incentive auction includes data or assumptions regarding the potential displacement impact on LPTV stations." *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Second Order on Reconsideration, 30 FCC Rcd 6746, 6812, para. 146 n.548 (2015); *see also* *Amendment of Part 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television and Television Translator Stations*, MB Docket No. 03-185 et al., Order, 30 FCC Rcd 116, 118, para. 6 (Media Bur. 2015) ("The Greenhill Report . . . did not involve an analysis of LPTV and TV translator stations.").

<sup>3</sup> *Espino v. Dep't of Justice*, 869 F. Supp. 2d 25, 28 (D.D.C. 2012); *Thomas v. Comptroller of the Currency*, 684 F. Supp. 2d 29, 33 (D.D.C. 2010); *American-Arab Anti-Discrimination Comm. v. Dep't of Homeland Security*, 516 F. Supp. 2d 83, 87-88 (D.D.C. 2007).



- 2) *Any and all communications, including emails, among FCC staff or the FCC's consultants concerning the impact(s) on channel assignments or stranding of LPTV stations with regard to completing the Reverse and/or Forward Incentive Auctions according to the scenario specifically represented in the Report.*

In attempting to fulfill your request, we have consulted with several subject matter experts that serve on the Incentive Auctions Task Force. These staff members have stated that the Commission did not, in connection with the Greenhill 1 Report, discuss or analyze the impact on channel assignments or stranding of LPTV stations. Similar to our discussion above, as the Commission did not conduct such discussion or analysis, we conclude there is no reasonable expectation of finding responsive documents.

- 3) *The "[e]xtensive auction simulations" referred to in fn. 2 on p. 35 of the Report. This request includes but is not limited to documents, data, or analyses concerning the LPTV channel clearing impacts in each DMA for the scenario that achieves the unified clearing results in the Appendix.*

The Incentive Auctions Task Force has identified the records in question, consisting of auction simulations that were referred to in footnote 2 of the Greenhill 1 Report. While Commission staff has released information regarding repacking simulations in other contexts,<sup>4</sup> the records covered by your request have not been released and are withheld pursuant to FOIA Exemption 5.<sup>5</sup> Exemption 5 protects certain inter-agency and intra-agency records that are normally considered privileged in the civil discovery context. Exemption 5 encompasses a deliberative process privilege intended to "prevent injury to the quality of agency decisions."<sup>6</sup> To fall within the scope of this privilege the agency records must be both predecisional and deliberative.<sup>7</sup> Predecisional records must have been "prepared in order to assist an agency decision maker in arriving at his decision."<sup>8</sup> Deliberative records must be such that their disclosure "would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the

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<sup>4</sup> See, e.g., *Aggregate Interference Simulations*, available at [http://data.fcc.gov/download/incentive-auctions/Simulation\\_Results/](http://data.fcc.gov/download/incentive-auctions/Simulation_Results/) (results of simulations released in June 2014 analyzing the potential for new aggregate interference to television stations under the Commission's adopted approach for preserving population served based upon pairwise interference limits); *Amendment of Parts 15, 73 and 74 of the Commission's Rules to Provide for the Preservation of One Vacant Channel in the UHF Television Band for Use by White Space Devices and Wireless Microphones*, MB Docket No. 15-146, Notice of Proposed Rulemaking, FCC 15-68 (rel. June 16, 2015), para. 11 n. 32 (relying on 2014 simulation results to assess impact on LPTV of preserving a white space channel for unlicensed use); *Incentive Auction Task Force Releases Initial Clearing Target Optimization Simulations*, GN Docket No. 12-268, AU Docket No. 14-252, Public Notice, 30 FCC Rcd 4854 (2015) (showing results of simulations of the procedure based on certain assumptions regarding broadcaster participation levels and impairments along the borders).

<sup>5</sup> 5 U.S.C. § 552(b)(5).

<sup>6</sup> *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 151 (1975).

<sup>7</sup> *Id.* at 151-52.

<sup>8</sup> *Formaldehyde Inst. v. Dep't of Health and Human Servs.*, 889 F.2d 1118, 1122 (D.C. Cir. 1989); see also *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) ("In deciding whether a document should be protected by the privilege we look to whether the document is . . . generated before the adoption of an agency policy and whether . . . it reflects the give-and-take of the consultative process. The exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents. . . .").



agency and thereby undermine the agency's ability to perform its functions."<sup>9</sup> These simulations reveal core deliberative processes, including with respect to the operation of the incentive auction mechanism, the impact of potential alternative auction scenarios, and decisionmaking regarding auction design. Release of this material would cause harm to the agency's deliberative process, and would hinder the agency's ability to use tools such as simulations in future decisions. As such, these records are properly withheld under Exemption 5. As noted above, moreover, the simulations did not consider LPTV stations. In connection with the Greenhill 1 Report, the simulations were used only to confirm the aggregate coverage population of stations that relinquish spectrum in order to calculate the estimated potential auction compensation for stations eligible to participate in the auction.<sup>10</sup>

The FOIA requires that "any reasonably segregable portion of a record" must be released after appropriate application of the Act's exemptions.<sup>11</sup> The statutory standard requires the release of any portion of a record that is nonexempt and that is "reasonably segregable" from the exempt portion. However, when, as here, nonexempt information is "inextricably intertwined" with exempt information, reasonable segregation is not possible.<sup>12</sup> The redactions and/or withholdings made are consistent with our responsibility to determine if any segregable portions can be released. To the extent non-exempt material is not released, it is inextricably intertwined with exempt material.

We also considered whether discretionary release is appropriate for the auction simulation records referred to in the third subpart of your request.<sup>13</sup> Because of the reasonably foreseeable harm to agency decision-making processes, we decline to make a discretionary release in this instance.

We are required by both the FOIA and the Commission's own rules to charge requesters certain fees associated with the costs of searching for, reviewing, and duplicating the sought after information.<sup>14</sup> To calculate the appropriate fee, requesters are classified as: (1) commercial use requesters; (2) educational requesters, non-commercial scientific organizations, or representatives of the news media; or (3) all other requesters.<sup>15</sup>

Pursuant to section 0.466(a)(4) of the Commission's rules, you have been classified as category (1), "commercial use requesters."<sup>16</sup> As a "commercial use requester," the Commission assesses charges to recover the full direct cost of searching for, reviewing, and duplicating the records sought.<sup>17</sup> However, as searching for and reviewing these records did not require an appreciable amount of staff time, you will not be billed for your FOIA request.

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<sup>9</sup> *Formaldehyde Inst.*, 889 F.2d at 1122 (quoting *Dudman Commc'ns Corp. v. Dep't of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987)).

<sup>10</sup> Greenhill Report at 34 & n.2.

<sup>11</sup> 5 U.S.C. § 552(b) (sentence immediately following exemptions).

<sup>12</sup> *Mead Data Center Inc. v. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

<sup>13</sup> See President's Memorandum for the Heads of Executive Departments and Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (2009).

<sup>14</sup> See 5 U.S.C. § 552(a)(4)(A), 47 C.F.R. § 0.470.

<sup>15</sup> 47 C.F.R. § 0.470.

<sup>16</sup> 47 C.F.R. § 0.466(a)(4).

<sup>17</sup> 47 C.F.R. § 0.470(a)(1).

If you consider this to be a denial of your FOIA request, you may seek review by filing an application for review with the Office of General Counsel. An application for review must be *received* by the Commission within 30 calendar days of the date of this letter.<sup>18</sup> You may file an application for review by mailing the application to Federal Communications Commission, Office of General Counsel, 445 12<sup>th</sup> St SW, Washington, DC 20554, or you may file your application for review electronically by e-mailing it to FOIA-Appeal@fcc.gov. Please caption the envelope (or subject line, if via e-mail) and the application itself as "Review of Freedom of Information Action."

Sincerely,

A handwritten signature in blue ink, appearing to read "W Scher", with a long horizontal flourish extending to the right.

William Scher  
Assistant General Counsel  
Deputy Chairman for Law & Policy – Incentive  
Auction Task Force

cc: FCC FOIA Office

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<sup>18</sup> 47 C.F.R. §§ 0.461(j), 1.115; 47 C.F.R. § 1.7 (documents are considered filed with the Commission upon their receipt at the location designated by the Commission).



# **Attachment B**

**ATTACHMENT B**  
Original FAB FOIA Request  
August 20, 2015  
FCC-2015-000729

**From:** [foia@erulemaking.net](mailto:foia@erulemaking.net) [mailto:[foia@erulemaking.net](mailto:foia@erulemaking.net)]

**Sent:** Thursday, August 20, 2015 3:12 PM

**To:** Colin Andrews <[CAndrews@gsblaw.com](mailto:CAndrews@gsblaw.com)>

**Subject:** FOIA Request FCC-2015-000729 Submitted

This message is to confirm your request submission to the FOIA online application: [View Request](#).  
Request information is as follows:

- **Tracking Number:** FCC-2015-000729
- **Requester Name:** Colin B. Andrews
- **Date Submitted:** 08/20/2015
- **Request Status:** Submitted
- **Description:**

On behalf of Free Access & Broadcast Telemedia, LLC, I hereby submit this FOIA request seeking the following:

- 1) Any and all comments, underlying assumptions, and/or output analysis conducted by FCC staff and consultants in preparation for the FCC's Greenhill 1 Report, ("Report") released in Oct., 2014. The FCC has acknowledged having modeled scenarios before and after that date analyzing channel clearing for each DMA which explicitly or implicitly cast light on the possible impacts on LPTV clearing and new LPTV assignments, if any. We seek copies of all these analyses, especially the versions selected that coincide with the Report.
- 2) Any and all communications, including emails, among FCC staff or the FCC's consultants concerning the impact(s) on channel assignments or stranding of LPTV stations with regard to completing the Reverse and/or Forward Incentive Auctions according to the scenario specifically represented in the Report. [Unified scenario summary: 126MHz, equal to 21 TV channels of 6MHz each, cleared nationwide (cited on p. 35); 100MHz sold (cited pp 9-10, 30-34, 35); gross revenue of \$45 billion (cited p. 2, implied pp 9-10, 30-35 by taking 300 million pops x 100MHz sold x \$1.50 per MHz-pop = \$45b); \$38b "profit" to the US Gov. after \$7b expenses (p. 35); and precise delineation of station values, and by implication, stations surrendered in the reverse in order to clear 126MHz nationwide (pp 9-10, 30-33).]
- 3) The "[e]xtensive auction simulations" referred to in fn. 2 on p. 35 of the Report. This request includes but is not limited to documents, data, or analyses concerning the LPTV channel clearing impacts in each DMA for the scenario that achieves the unified clearing results in the Appendix.
- 4) To keep the costs and burden of this request low, FAB does not request copies of any publicly available notices or documents available in ECFS.
- 5) Pursuant to 47 C.F.R. § 0.461, we expect a response within 20 days.

=====END OF SUBMISSION =====

**ADDED INFORMATION:**

**Full Greenhill 1 Report was attached as a PDF file.**

Also available at: <http://apps.fcc.gov/ecfs/document/view?id=60001012317>

**Expedited Processing was requested.**

**Free Access Telemedia FOIA Request for Expedited Processing**

We respectfully request an expedited processing of this request and certify it is in the compelling and nationwide public interest, affecting over 4,000 FCC LPTV and related “translator” issued wireless broadcasting licenses. This information relates directly and importantly to both a rulemaking just concluded in FCC Docket 12-268 for which judicial appeals are now likely to be filed before October 4, 2015. In addition, this information applies directly to another ongoing rulemaking in FCC Docket 03-185 for which the FCC requires public “benefit-disadvantage analysis” be included for proposals and comments offered. Without this information both the concluded rulemaking, subsequent appeal(s), and the ongoing additional rulemaking are at due process risk and less than full disclose to ensure no arbitrary and capricious decisions are made by the Commission without disclosure to the public of the possible and extensively-modeled impacts of the rules.

The FCC has promised that at some future point impacts will be released for LPTV stations nationwide, but that time is overdue for the already concluded first rulemaking and the nearly concluded second rulemaking for which the comment period is already closed. The FCC stated in an FCC Order dated January 8, 2015, paragraph 7, at: [https://apps.fcc.gov/edocs\\_public/attachmatch/DA-15-31A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DA-15-31A1.pdf) that “Moreover, to the extent that Free Access [our client] seeks access to any data demonstrating the impact of the incentive auction on LPTV stations, the issue of such impact, which has been raised in the docket of the incentive auction proceeding, will be considered at a future date.” Respectfully, it is essential that the FCC release its extensive analyses information, so as not to increase the costs to the Government and the public for petitions for reconsideration and appeals if this information is not timely produced. Therefore, this request is timely and expediting it is in the nationwide public interest.

**END**



# **Attachment C**



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G A R V E Y S C H U B E R T B A R E R

A PARTNERSHIP OF PROFESSIONAL CORPORATIONS

Please reply to COLIN BLACK ANDREWS  
candrews@gsblaw.com TEL EXT 1736

October 21, 2015

**VIA E-MAIL**

Office of General Counsel  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Re: Review of Freedom of Information Action – FOIA Control No. 2015-729

Dear Sir or Madam:

Our firm represents Free Access & Broadcast Telemedia, LLC (“FAB”) with regard to its August 20, 2015, Freedom of Information Act (“FOIA”) request to the Federal Communications Commission (“FCC”) (the “Request”). This letter is FAB’s appeal to the FCC’s September 21, 2015, Response Letter denying FAB’s Request (the “Denial”). A copy of FAB’s Request and the FCC’s Denial are attached hereto for your reference.

The Request as submitted sought responsive documents and communications relating to the Incentive Auction and the FCC’s Greenhill 1 Report. The Request’s scope was narrowed via email on August 28, 2015, to focus on the following items: 1) “any and all comments, underlying assumptions, and/or output analysis conducted by staff and consultants in preparation for the FCC’s Greenhill 1 Report (the “Report”)” and 2) “extensive auction simulations referred to in fn. 2 on p. 35 of the Report.” With regard to the first set of documents sought by the Request, the Denial determined there was no reasonable expectation of finding responsive documents. As for the auction simulations referred to by the Report, the Denial refused to release the documents under FOIA exemption 5. Accordingly, FAB files this timely appeal.

The basis for this appeal is twofold: 1) the FCC has violated FOIA by failing to conduct an adequate search for the records that are responsive to item one of the Request and 2) the FCC employed an overly broad application of FOIA exemption 5 for withholding records that were responsive to item two.



The FCC has a duty to demonstrate beyond a reasonable doubt that a search was “reasonably calculated to uncover all relevant documents.” *Valencia-Lucena v. United States Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990); see also *Defenders of Wildlife v. U.S. Border Patrol*, 623 F.Supp. 2d 83, 92 (D.D.C. 2009). FOIA is designed to empower the public to “pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” See, e.g., *Dept. of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). As the Supreme Court has observed, “virtually every document generated by an agency is available in one form or another, unless it falls within one of the Act’s nine exemptions.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975).

In order to withhold a document under FOIA exemption 5, the FCC must prove that the responsive document is both predecisional and deliberative, as opposed to factual material which would be generally available to discovery. See *Montrose Chem. Corp. v. Train*, 491 F.2d 63, 66 (D.C. Cir. 1974). Even in a situation where a document would fall under FOIA’s exemption 5, that document’s privilege can be waived where a final decisionmaker chooses expressly to adopt or incorporate it by reference. See *Sears*, 421 U.S. at 151.

With respect to the first set of documents identified in the Request, the Denial determined that the FCC did not model any scenarios or channel clearing impacts in connection with the Greenhill Report that “cast light on possible impacts on LPTV clearing and new LPTV assignments.” Therefore, the Denial concluded that there is no reasonable expectation of finding responsive documents. The Request, however, was broader in scope than the characterization in the Denial. The Request sought “any and all” comments or other records concerning the report, including but not limited to comments that pertain to underlying assumptions and/or output analysis conducted by the FCC.

The Denial also withheld the auction simulations referred in footnote 2 of the Report under FOIA exemption 5, claiming that the responsive documents were privileged intra-agency documents that were both predecisional and deliberative. The Denial’s broad application of the FOIA exemption 5 to withhold even redacted versions of these documents fails to meet the requisite statutory mandate under FOIA. The auction simulations identified by the Report are factual by nature and do not reveal the agency’s pre-deliberative decision making, and are therefore not subject to FOIA exemption 5 because they are not deliberative as to any FCC final decision. Further, even if the withheld documents were subject to FOIA exemption 5, the FCC had waived this privilege by expressly incorporating the auction simulations into the Report.

Disclosure of the responsive documents identified in the Request would promote transparency and better inform the public of the possible impact of the FCC’s Incentive Auction. Such government transparency directly reflects the Obama administration’s policy to support our nation’s fundamental commitment to open government and a presumption of disclosure, as expressly proclaimed in both Attorney General Holder’s March 29, 2009 FOIA Memorandum to





all Executive Departments and Agencies, and the FOIA policies announced by President Obama's January 21, 2009 Freedom of Information Act Memorandum to all federal agencies.

Please inform my office of any "unusual circumstances" that will cause a delay in timely responding to this FOIA appeal and also provide me the approximate date by which you expect to issue a final response to this FOIA appeal.

If you have any questions concerning this appeal or need any further clarification, please call me at (202) 298-1736, or email me at [candrews@gsblaw.com](mailto:candrews@gsblaw.com).

Sincerely,

Colin Black Andrews

CBA:cll  
Enclosures

GSB:7347865.1

# **Attachment D**

## ATTACHMENT D

FAB FOIA Continuation – November 10, 2015  
No new FOIA Contol No. ASSIGNED – Continuation from FCC-2015-000729

**From:** Colin Andrews [mailto:CAndrews@gsblaw.com]  
**Sent:** Monday, November 09, 2015 4:30 PM  
**To:** Ryan Yates  
**Subject:** Continuing FAB FCC FOIA FCC-2015-000729 Item #2

Good Afternoon Ryan,

Following up on last week's call, I wanted to send you an email with a reorganized name list and some search terms. This search is a continuation of part 2 of our initial FOIA request, included in full below, but we understand that a new FOIA number will be provided for tracking purposes. The initial response to FAB's FOIA is currently under appeal.

We continue to seek responsive documents from the following individuals initially identified to you on August 28, 2015, and again here in the attached excel spreadsheet. We have broken these names down into three batches, with a possible fourth batch if necessary. As we have stated in the past, FAB would like to be kept appraised regarding timing and cost estimates for this search.

We request that the initial search be completed within 10-20 business days, and then subsequent batches be completed in 10 business day increments. The search period should extend from May 1, 2014 through today's date in order to cover any analyses that could have impacted the Greenhill 1 Report, released on October 1, 2014, or that followed after that date from the Report's representations after that date.

We have attached a list of search terms (Attachment B). For each individual, we request:

1. Reply sought generally, yes or no: Do you believe have docs responsive to **Item #2 below** in your possession, on your "N" (personal) or "K" (shared) drives, or otherwise available to you? This includes presentations and docs from the sources such as FCC outside consultants. If yes, please provide all relevant documents.
2. Please also perform a Boolean search of the following terms on your Outlook. Add other terms if you believe you may have documents but feel a better search request will retrieve them per your response of yes in Part A above.
  - a. Also perform the same searches on your N drive
  - b. Also perform the same searches on your K drive

Please let me know if you have any questions or need clarification on anything regarding this search.

Thanks,

Colin



-----INITIAL FOIA REQUEST-----

On behalf of Free Access & Broadcast Telemedia, LLC, I hereby submit this FOIA request seeking the following:

1) Any and all comments, underlying assumptions, and/or output analysis conducted by FCC staff and consultants in preparation for the FCC's Greenhill 1 Report, ("Report") released in Oct., 2014. The FCC has acknowledged having modeled scenarios before and after that date analyzing channel clearing for each DMA which explicitly or implicitly cast light on the possible impacts on LPTV clearing and new LPTV assignments, if any. We seek copies of all these analyses, especially the versions selected that coincide with the Report.

2) Any and all communications, including emails, among FCC staff or the FCC's consultants concerning the impact(s) on channel assignments or stranding of LPTV stations with regard to completing the Reverse and/or Forward Incentive Auctions according to the scenario specifically represented in the Report. [Unified scenario summary: 126MHz, equal to 21 TV channels of 6MHz each, cleared nationwide (cited on p. 35); 100MHz sold (cited pp 9-10, 30-34, 35); gross revenue of \$45 billion (cited p. 2, implied pp 9-10, 30-35 by taking 300 million pops x 100MHz sold x \$1.50 per MHz-pop = \$45b); \$38b "profit" to the US Gov. after \$7b expenses (p. 35); and precise delineation of station values, and by implication, stations surrendered in the reverse in order to clear 126MHz nationwide (pp 9-10, 30-33).]

3) The "[e]xtensive auction simulations" referred to in fn. 2 on p. 35 of the Report. This request includes but is not limited to documents, data, or analyses concerning the LPTV channel clearing impacts in each DMA for the scenario that achieves the unified clearing results in the Appendix.

4) To keep the costs and burden of this request low, FAB does not request copies of any publicly available notices or documents available in ECFS.

5) Pursuant to 47 C.F.R. § 0.461, we expect a response within 20 days.

**COLIN BLACK ANDREWS**

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# **Attachment E**

**Congress of the United States**  
**House of Representatives**  
**Washington, DC 20515-3302**

October 22, 2015

The Honorable Tom Wheeler  
Chairman  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

*Re: Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions, Docket No. 12-268, and*

*Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power TV and Translator Stations, Docket No. 03-185*

Dear Mr. Chairman:

We write to applaud your efforts to achieve a successful Spectrum Incentive Auction. As supporters of the Middle Class Tax Relief and Job Creation Act ("Spectrum Act"), it is our view that a successful auction must make an effort to accommodate Low-Power Television ("LPTV") stations and translators so they may continue to serve their communities, whether urban, suburban, or rural.

As our colleagues Representatives Greg Walden and Joe Barton reminded you in a letter on August 4<sup>th</sup>, Congress and the FCC agree on the importance of community-based LPTV and translators. LPTV and translators provide the public with a diverse selection of programming and content representing many different cultures, denominations, and worldviews.

Following our July 28, 2015 oversight hearing, we are concerned that following the FCC's broadcast incentive auction there may not be sufficient spectrum to accommodate LPTV stations and translators, potentially forcing them to cease operation.

In order to retain as many of these valuable voices in our communities, it is essential that the FCC limit the incentive auction's impact on LPTV service as much as possible without harming the goals of the incentive auction or delaying its progress.

By November 18, 2015, I would like you to provide us with the following:


1. A detailed status of the Commission's open rulemaking on considering additional means to mitigate the potential impact of the incentive auction and the repacking process on


LPTV and TV translator stations to help preserve the important services they provide (Docket No. 03-185 and No. 12-268), specifically addressing whether this rulemaking will be completed well before auction.

2. In addition, we would also appreciate if you provided whatever analyses and studies that have been conducted by your staff and consultants on the impacts on possible stranding or effective extinguishment of LPTV stations in an auction that clears 126 MHz in the reverse stage and sells 100MHz in the tandem forward event nationwide in all markets, as your staff and investment banking agents have been marketing. Please provide these forecasted LPTV clearing effects by TV market.
3. Lastly, we would also like you to release any alternate scenarios already in-hand that provide ranges of impacts upon LPTV for clearing down to 84 MHz and up also up to 132 MHz of spectrum, as have appeared in various FCC public statements as possible auction goals and outcomes.

We look forward to your response.

Sincerely,

  
Renee Elmers (R-NC)  
Member of Congress

  
Kevin Cramer (R-ND)  
Member of Congress

  
Gus M. Bilirakis (R-FL)  
Member of Congress

  
Billy Long (R-MO)  
Member of Congress

cc: Hon. Mignon Clyburn, FCC Commissioner  
Hon. Michael O'Rielly, FCC Commissioner  
Hon. Ajit Pai, FCC Commissioner  
Hon. Jessica Rosenworcel, FCC Commissioner